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No. 77-1005

In the Supreme Court of the United States

OCTOBER TERM, 1977

ROBERT E. BROWN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals (Pet. 42-44) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on December 14, 1977. The petition for a writ of certiorari was filed on January 14, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether, in the circumstances of this case, the court of appeals erred in relying on the trial court's statement regarding what transpired during a portion of the trial proceedings that was not transcribed because of a wholly inadvertent erasure of the reporter's tape recording.

2. Whether the evidence was sufficient to sustain petitioner's conviction.

3. Whether loansharking or organized crime activities are essential elements of a violation of 18 U.S.C. 894.

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Michigan, petitioner was convicted of conspiring to collect, and of aiding and abetting the collection of, an extension of credit by extortionate means, in violation of 18 U.S.C. 2 and 894. He was sentenced to concurrent terms of one year's imprisonment, of which all but 60 days were suspended in favor of probation.[1] The court of appeals affirmed (Pet. 42-44).

The evidence at trial showed that in December 1972 petitioner lent $3,000 to Cecil Tucker. Tucker testified that the loan was to be interest-free, that there was no time limit for repayment, and that in the next two years he repaid part of the amount (Tr. 54-57, 129).

In the fall of 1974, petitioner called Tucker and requested repayment in full; however, Tucker was unable to repay the entire amount (Tr. 57). Because he felt he could not collect the loan through legal channels and because he was fearful that his employer would regard the relationship with Tucker as a conflict of interest,[2] petitioner asked Welsh, whom he knew to be a "very rough talking man," for assistance, telling him that

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[1]Petitioner's co-defendant, Lawrence Malcolm Welsh, was convicted and sentenced to concurrent terms of 18 months' imprisonment and a fine of $5,000.

[2]Petitioner was a foreman with Michigan Bell, which awarded contracts to Tucker's company.

Tucker owed him $15,000 and offering Welsh 25 percent of whatever he collected (Tr. 190, 211-213). Thereafter, Welsh called Tucker and threatened to do injury to him and his family if Tucker did not pay $16,000; he gave Tucker three hours to consider this ultimatum (Tr. 62-63). After reporting the threat to local police (Tr. 64), Tucker telephoned Welsh. In that telephone call, which was recorded by the police with Tucker's consent, Welsh threatened to "[p]ut you in one of my fuckin rubbish trucks and grind you up" (Gov't Exh. 1, 1a). Tucker met with petitioner the next morning. Petitioner asked Tucker if Welsh had gotten in touch with him. Tucker said yes and offered to repay the $3,000; petitioner said he was not interested (Tr. 117, 122). No further threats were made by petitioner or Welsh.

A portion of the trial was not transcribed due to an inadvertent erasure of the court reporter's stenomask tape. The untranscribed portions of the trial included five minutes of petitioner's direct testimony, his cross-examination and redirect examination, the testimony of a witness called by co-defendant Welsh, closing arguments, and the court's charge to the jury. When the mistake became known, the parties resorted to Rule 10(c), Fed. R. App. P., which provides for a settled statement of evidence or proceedings.[3] Petitioner submitted a statement of the proceedings, with affidavits from persons

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[3]Rule 10(c) provides:

(c) **Statement of the Evidence or Proceedings When no Report Was Made or When the Transcript is Unavailable.** If no report of the evidence or proceedings at a hearing or trial was made, or if a transcript is unavailable, the appellant may prepare a statement of the evidence or proceedings from the best available means, including his recollection. The statement shall be served on the appellee, who may serve objections or propose amendments thereto within 10 days after

present in the court at the time; the government submitted its objections to petitioner's version; and the district court prepared its "Statement Under Rule 10(c), Rules of Appellate Procedure, as Settled By The Court" (hereafter "Statement").

ARGUMENT

Petitioner contends (Pet. 11-27) that the prosecutor made remarks in closing argument which prejudiced him and that evidence which would have created a reasonable doubt as to his guilt was not transcribed. These claims are without merit.

1. The claim that the prosecutor made improper remarks during closing argument refers to comments of the prosecutor as he was reading excerpts of petitioner's grand jury testimony. As the district court noted in its Statement, petitioner objected to the fact that the prosecutor was interspersing argument with recital of the statement. The court overruled the objection but directed the prosecutor to make "very clear" where reading and argument began and ended; the court stated that the prosecutor complied (Statement 8). In denying petitioner's post-trial motion for a new trial, which was partially based on this allegation of error, the court stated that the jury was sufficiently informed by both the attorneys and the court itself that statements by counsel were not evidence (Tr. II, 4; see also Tr. 28).[4]

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service. Thereupon the statement and any objections or proposed amendments shall be submitted to the district court for settlement and approval and as settled and approved shall be included by the clerk of the district court in the record on appeal.

[4]"Tr. II" refers to the sentencing transcript.

The court also found no error in the prosecutor's characterization of Welsh's threats—to put Tucker in a garbage truck and "grind him up"—as a threat to "kill" Tucker (Statement 8). Because the prosecutor was entitled to comment on evidence admitted at trial and to draw reasonable inferences, including the inference that a threat to grind someone up is a murder threat (see *United States* v. *Serlin*, 538 F. 2d 737 (C.A. 7); *United States* v. *Lindsay*, 552 F. 2d 263 (C.A. 8)), there was no error in the prosecutor's closing argument.

2. The fact that a verbatim record of petitioner's own testimony was not before the court of appeals was not grounds for reversal. The district court's Statement addressed the parties' summary of that testimony (Statement 4-6). In any event, a reviewing court need not weigh conflicting evidence, but must determine only whether there was sufficient evidence presented by the government to support the jury's verdict. *Glasser* v. *United States*, 315 U.S. 60, 80; *United States* v. *Walton*, 552 F. 2d 1354 (C.A. 10); *Massey* v. *United States*, 407 F. 2d 1126 (C.A. 9); *United States* v. *Valle-Valdez*, 554 F. 2d 911 (C.A. 9). After finding that the government presented enough evidence to sustain petitioner's conviction, the court of appeals was not required to consider petitioner's conflicting testimony in order to make an independent adjudication of guilt.

3. Petitioner further asserts that the court of appeals improperly relied on the district court's version of what took place, and that the gap in the transcript violated his statutory right to a verbatim record. The trial court, however, fully complied with Rule 10(c), Fed. R. App. P., which provides the mechanism for settling the record where the transcript is unavailable. Absent a showing of intentional falsification or evident unreasonableness, that

determination is conclusive and may properly be accepted by the court of appeals. Cf. *United States* v. *Mori*, 444 F. 2d 240, 246 (C.A. 5), certiorari denied, 404 U.S. 913; *Buick* v. *United States*, 396 F. 2d 912, 913-914 n. 1 (C.A. 9).[5]

4. Petitioner also contends (Pet. 28-36) that the evidence was insufficient to sustain his conviction. This contention is insubstantial.

The uncontradicted evidence demonstrated that petitioner, seeking to collect a $3,000 debt from Tucker and feeling that he could not use available legal channels, employed co-defendant Welsh because he knew that Welsh was a "very rough talking man," that he told Welsh that Tucker's debt was $15,000, and that he offered Welsh 25 percent of whatever Welsh collected. There was also substantial evidence that Welsh sought to frighten Tucker into making the payment through the use of threatening telephone calls. The logical and permissible inference is that petitioner was aware of and at least implicitly consented to the threats that Welsh employed; this is sufficient, even without proof that petitioner knew all the details of Welsh's conduct, to sustain his conviction for aiding and abetting the commission of the offense. See *Williams* v. *United States*, 308 F. 2d 664 (C.A. 9); *United States* v. *Greer*, 467 F. 2d 1064 (C.A. 7), certiorari denied, 410 U.S. 929.

Petitioner additionally suggests that the government failed to establish that Tucker was put in fear for his own safety. To sustain a conviction under 18 U.S.C. 894,

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[5] *Calhoun* v. *United States*, 384 F. 2d 180 (C.A. 5), *Brown* v. *United States*, 314 F. 2d 293 (C.A. 9), and *Fowler* v. *United States*, 310 F. 2d 66 (C.A. 5), as well as other cases relied upon by petitioner, are inapplicable, since they involve deliberate failure to record testimony in violation of 28 U.S.C. 753(b), which the instant case does not.

however, "[a]ctual fear need not be generated, so long as the defendants intended to take actions which reasonably would induce fear in an ordinary person * * *. [I]t is the conduct of the defendant, not the victim's individual state of mind, to which the thrust of the statute is directed. We have no doubt that Congress meant to protect not only the weak and timid from extortionate threats, but the strong and intrepid as well." *United States* v. *Natale*, 526 F. 2d 1160, 1168 (C.A. 2), certiorari denied, 425 U.S. 950. See also *United States* v. *Alsop*, 479 F. 2d 65, 67 (C.A. 9).

5. Petitioner's final contention (Pet. 37-40) that 18 U.S.C. 894 is intended to apply only to loansharking or racketeering activity, is unsupported by the language of the statute. See *Barrett* v. *United States*, 423 U.S. 212, 217. Moreover, the courts of appeals that have considered the issue agree that although Congress meant Section 894 to be employed against organized crime and loansharking enterprises, it did not intend to limit the scope of the statute's application to those activities. "It is sufficient that Congress has defined a limited class of credit transactions, *i.e.*, those involving extortionate means of extension and collection, as having a substantial effect on interstate commerce. That this particular transaction cannot be directly tied to organized crime, does not affect the validity of the congressional approach employed here." *United States* v. *Keresty*, 465 F. 2d 36, 42-43 (C.A. 3), certiorari denied, 409 U.S. 991. See also *United States* v. *Schwartz*, 548 F. 2d 427, 428 (C.A. 2); *United States* v. *Schaffer*, 539 F. 2d 653, 654-655 (C.A. 8); *United States* v. *Andrino*, 501 F. 2d 1373, 1376-1378 (C.A. 9); *United States* v. *Annerino*, 495 F. 2d 1159, 1164-1165 (C.A. 7); *United States* v. *Briola*, 465 F. 2d 1018, 1021 (C.A. 10), certiorari denied, 409 U.S. 1108. Since Congress intended to regulate extortionate credit transactions as a "class of activities," there is no reason to limit the scope of the

statute to activities involving organized crime or loansharking, particularly since the language of the statute provides no such limit. Cf. *Perez* v. *United States*, 402 U.S. 146, 154.

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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